SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1942.

AINTREE CORPORATION,
a Corporation,
Petitioner,
vs.
NATIONAL LABOR RELATIONS BOARD,
Respondent.
No. .....

SUPPORTING BRIEF.

I.

OPINION OF THE COURT BELOW.

The majority opinion of the Circuit Court of Appeals for the Seventh Circuit appears at pages 321-327, inclusive, of the Appellate proceedings below, printed under the supervision of the clerk of this Court. Said opinion has not yet been reported.

The dissenting opinion of Circuit Judge Major appears at pages 327-332, inclusive, of said printed record of the Appellate proceedings below, and is printed as an appendix hereto.

The decree of said Circuit Court of Appeals appears at pages 336-338, inclusive, of said printed record of the Appellate proceedings.

The decision and order of the National Labor Relations Board appears at pages 341-371, inclusive, of the appendix to the brief of the Board (petitioner below), and is reported in 37 National Labor Relations Board Decisions 1174.

II.

JURISDICTION OF THIS COURT.

A statement particularly disclosing the basis upon which it is contended that this Court has jurisdiction to review the judgment and decree in question appears at pages 3-4, inclusive, of the petition for writ of certiorari, and in the interest of brevity such statement is not here repeated.

III.

DATE OF FINAL JUDGMENT BELOW.

The date of the order of said Circuit Court of Appeals that the Board's petition for Enforcement of its order be granted is November 12, 1942 (A. P. 333). Petitioner's petition for rehearing was duly filed in said Circuit Court of Appeals on November 27, 1942 (A. P. 333), and was denied on December 4, 1942 (A. P. 336).

The decree of said Circuit Court of Appeals for the Enforcement of the Board's order was made and entered on December 4, 1942 (A. P. 336-338).

IV.

STATEMENT.

A full statement of the case has been made in the petition for writ of certiorari, and in the interest of brevity the statement is not here repeated.

V.

SPECIFICATIONS OF ERROR.

The Circuit Court of Appeals for the Seventh Circuit erred:

1. In sustaining the Board's finding and conclusion that, under the National Labor Relations Act, the petitioner was required to restrain its foremen and foreladies from attending meetings of The Better Union and that petitioner's failure to so restrain them was an unfair labor practice.

2. In sustaining the Board's finding and conclusion that, by continuing "unchecked" to attend meetings of The Better Union, the petitioner's foremen and foreladies "continued thereby to throw (the petitioner's) support to that organization."

3. In granting and making an order that the petitioner post notices which state only with respect to the employees' organizational rights, that the employees are free to become or remain members of the International and that the petitioner will not discriminate against any employee because of membership or activity "in that organization," and which fail to state and inform the employees that they are free to join or organize any union they choose without being limited to the International.

4. In granting and making a blanket injunctive order against this petitioner.

5. In holding and deciding that the Board's findings that petitioner had engaged in unfair labor practices within the meaning of Section 8 (1), (2) and (3) of the Act are supported by substantial evidence.

6. In holding and deciding that the Board's order is supported by the record.

ARGUMENT.

POINT I.

(Assignment of Errors 1 and 2.)

This Court should resolve the dilemma in which this petitioner and employers generally have been placed by the decision in this case. In the cases hereinafter quoted from, the Circuit Courts of Appeals for the Second and Eighth Circuits have held and decided that a foreman is an employee within the meaning of the Act, and that an employer is guilty of unfair labor practices if he restrains or interferes with a foreman in the foreman's exercise of his union rights as guaranteed under the Act. In this case the petitioner's foremen and foreladies, in the exercise of the rights guaranteed employees under the Act, attended meetings of The Better Union. Such attendance constituted their sole union activities and was not found to have been other than of their own volition. The Circuit Court of Appeals for the Seventh Circuit has held the petitioner guilty of unfair labor practices because the petitioner failed to "restrain" its foremen and foreladies from attending such union meetings, and has held that said employees, by continuing "unchecked" to attend such meetings "continued thereby to throw (the petitioner's) support to that organization."

In National Labor Relations Board v. Skinner and Kennedy Stationery Company, 113 F. (2d) 667, 670-671, the Circuit Court of Appeals for the Eighth Circuit said:

> "It is first argued that Eckert is not an employee within the meaning of the Act. * * * a foreman, in his relation to his employer, is an employee, * * *. Nothing in the Act excepts foremen from its benefits nor from protection against discrimination nor unfair labor practices of the master."

In National Labor Relations Board v. Luxuray, Inc., 123 F. (2d) 106, 108, **International Ladies' Garment Workers' Union** had complained that one Ethel Weller, a forelady employed by the respondent in that case, had been discharged on account of membership in said Union. The Circuit Court of Appeals for the Second Circuit upheld the Board's order that she be reinstated with back pay. In its opinion the Court said:

> "Mrs. Weller had acted as a forelady * * *. She had been a member of the (International Ladies' Garment Workers' Union) for about nine months before she was laid off, had been conspicuously active in the Union organization, and had had weekly meetings held for that purpose at her house."

The petitioner's predicament is aptly described in the dissenting opinion of Circuit Judge Major (A. P. 332) as follows:

> "* * * Moreover, what was (petitioner) to do? If it had discharged such supervisory employees for attending or joining either of these Unions, it no doubt would have been charged with discrimination. Such was the predicament of the employer in National Labor Relations Board v. Luxuray, Inc., 123 Fed. (2d) 106, 108. * * *."

We respectfully submit that this question is one of high and general importance, and that this Honorable Court should review the decision of the Court below and announce the rule and law respecting the rights of a foreman under the Act and the employer's duties and obligations with reference thereto.

POINT II.

(Assignment of Error 3.)

The Board's order (B. A. 371) and the decree of the Court below (A. P. 338) require and direct that the petitioner post notices to its employees stating with respect to

their rights under the Act that the employees "are free to become or remain members of (International), and that the (petitioner) will not discriminate against any employee because of membership or activity in that organization."

In National Labor Relations Board v. Baldwin Locomotive Works, 128 F. (2d) 39, 51, the Circuit Court of Appeals for the Third Circuit said:

> "Good faith in the effectuation of that intent and spirit requires that an employee's freedom to join any union he may choose be made clear and not left to inference."

In Westinghouse Electric & Mfg. Co. v. National Labor Relations Board, 112 F. (2d) 657, 661 (affirmed per curiam in 312 U. S. 660), the Circuit Court of Appeals for the Second Circuit said:

> "To post notices that the 'Independent' has been 'disestablished,' and to say nothing more, may well lead the employees to conclude that any unaffiliated union will fall under the same ban. * * * rigid impartiality between all kinds of organizations * * * demands public declaration that after (the Independent) has been 'disestablished' the field will be open for the employees' choice of any form they prefer.' For this reason Article II (a) of the order will be modified by adding the following suffix: 'but the employees are free to organize any union they choose, whether or not it is affiliated with a national union.' "

In National Labor Relations Board v. American Rolling Mill Co., 126 F. (2d) 38, 42, the Circuit Court of Appeals for the Sixth Circuit said:

> "Paragraph 2 (b) of the order by which the Board required the posting of appropriate notices should be so amended as to have added to the end of the paragraph the following: 'but that the employees are free

to organize or join any union they choose whether affiliated with a national union or one without any affiliation.' "

To the same effect is the decision of the Circuit Court of Appeals for the Eighth Circuit in Cudahy Packing Co. v. National Labor Relations Board, 102 F. (2d) 745, 753.

POINT III.

(Assignment of Error 4.)

Notwithstanding the total absence of any evidence that petitioner has any antiunion history, or that petitioner has ever fostered company unions, broken strikes or been guilty of espionage, and upon evidence which has prompted one member of the Court below to characterize the Board's decision as "calculated to bring the National Labor Relations Act into disrepute * * *," the Court below has ratified just such a drastic and blanket injunctive order against this petitioner as has heretofore been held applicable in the case of notorious labor baiters whose activities had run the gamut of every known form of unfair labor practice.

There is no reported case in which such a general injunction was sustained upon findings of conduct so mild and isolated as those alleged in the instant case, and this is so without taking account of the fact that the Board was required to make strained references and forced deductions in order to find even such acts.

The summary of the evidence made by the Court below respecting petitioner's alleged violations of the Act are that Baker, whose employment had been terminated prior to the time of the hearing (B. A. 28-29), expressed his disapproval of unions; the foremen and foreladies (in the exercise of their rights) attended meetings of The Better Union; Clem Anthis visited the manager's office "with a

frequency that had not been observed previously and he was frequently seen sitting chatting with Leary;" and one member of the International was discharged because of unspecified "activities on behalf of International." *

The petitioner's president took vigorous action to assure not only its employees, but the representatives of the International, that the rights of the employees under the act would be duly respected and that no discrimination against them would be tolerated (B. A. 362). There is no evidence and no finding that the efforts and statements of the petitioner's president and plant manager were insincere. Without any legal obligation so to do, the petitioner's president and plant manager met with representatives of the International on December 10, 1940, and went to unusual lengths in their efforts to make absolutely known to the employees that they were free to take such action as they desired with respect to union affiliation and activities (B. A. 105, 110, 114, 116, 122; R. A. 72, 75).

In National Labor Relations Board v. Express Publishing Co., 312 U. S. 426, 433, 434, 435, 436, 437, this Court said:

> "But we think it does not follow that, because the act of respondent which the Board has found to be an unfair labor practice defined by Sec. 8 (5) is also a technical violation of Sec. 8 (1), the Board, in the circumstances of this case, is justified in making a blanket order restraining the employer from committing any act in violation of the statute, however unrelated it may be to those charged and found, or that courts are required for the indefinite future to give effect in contempt proceedings to an order of such breadth.

*The nonconflicting evidence shows that other and more active union members were retained and even given more profitable and more desirable work; that the president of International, Willene Shaw, was retained despite the fact that, following a warning respecting her work, she continued to fail to earn the amount of the "code"; and that two new employees (Paula Sheehorn and Helen Harrelson) subsequently hired in another department were also members of the International.

"We cannot find such authority or requirement in the carefully chosen language of Sec. 10 (c), which directs the Board to state its findings of fact showing the unfair labor practice charge and to order the person accused to 'cease and desist from such unfair labor practice,' or in Sec. 10 (e) of the Act which authorizes the court on application of the Board to enter a 'decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board.' It is obvious that the order of the Board, which when judicially confirmed, the courts may be called on to enforce by contempt proceedings, must, like the injunction order of a court, state with reasonable specificity the acts which the respondent is to do or refrain from doing. It would seem equally clear that the authority conferred on the Board to restrain the practice which it has found the employer to have committed is not an authority to restrain generally all other unlawful practices which it has neither found to have been pursued nor persuasively to be related to the proven unlawful conduct.

"Congress has itself afforded a guide pointing to the appropriate limits of the order which the Board is to make in restraining unfair labor practices. By its definition and classification of unfair labor practices in the statute it has shown that they are not always so similar or related that the commission of one necessarily merits or rightly admits of an order restraining all."

* * * * * * *

"But the mere fact that a court has found that a defendant has committed an act in violation of a statute does not justify an injunction broadly to obey the statute and thus subject the defendant to contempt proceedings if he shall at any time in the future commit some new violation unlike and unrelated to that with which he was originally charged."

* * * * * * *

"The breadth of the order, like the injunction of a court, must depend upon the circumstances of each

case, the purpose being to prevent violations, the threat of which in the future is indicated because of their similarity or relation to those unlawful acts which the Board has found to have been committed by the employer in the past."

* * * * * * *

"To justify an order restraining other violations it must appear that they bear some resemblance to that which the employer has committed **or that danger of their commission in the future is to be anticipated from the course of his conduct in the past.**" (Emphasis ours.)

What is there in this record to justify a conclusion that danger of every form of coercive action is to be anticipated? The Board's findings are primarily based upon alleged statements of Baker. But the record shows that Baker is no longer in the company's employ (B. A. 28-29). The court below did not find that any supervisory employee other than Baker made any "coercive" statements. And the Board as well as the court below have recognized in their respective opinions that the company's president and its plant manager issued instructions that the supervisory employees were not to interfere with the organizational rights of the employees (B. A. 348, 362, 364; A. P. 324).

POINT IV.

(Assignment of Errors 5 and 6.)

In the dissenting opinion of Circuit Judge Major there is a full and fair resume and consideration of the petitioner's freedom from any anti-union history, the "setting" and background in which Baker's statements were made, and the evidence with respect to Clem Anthis. Such dissenting opinion further points out that:

"The unfavorable background, so heavily stressed by the Supreme Court in cases such as International

> Association of Machinists, Tool and Die Makers v. National Labor Relations Board, 311 U. S. 72, and National Labor Relations Board v. Link-Belt Company, 311 U. S. 584, places the instant case in a different category."

We respectfully refer to such dissenting opinion in support of our contentions that the Board's findings that petioner has engaged in unfair labor practices are not supported by substantial evidence, that the Board's order is not supported by the record, that the Board and the Court below completely ignored the petitioner's background, and that the Court below has misconstrued the decision of this Court in National Labor Relations Board v. Link-Belt Company, 311 U. S. 584, 599, and has failed to consider the statements of Baker "in their setting."

We respectfully add the following with respect to the decision that Mina Hale was discriminatorily discharged.

There was no evidence that the petitioner had any knowledge that Mina Hale was a member of the International at the time of her lay-off. Hale was not an officer or board member of the International. Her sole union activities were that she attended meetings of the International and told several of the employees that she thought "the union was for our benefit" (B. A. 127, 156).

The nonconflicting evidence conclusively establishes that the department in which Hale worked was overmanned (B. A. 37, 252-253; R. A. 17-18, 96). Dora Sanders, a nonmember of International, as well as Hale, was laid off (R. A. 18-19, 80; B. A. 140). There is no evidence or claim that any officer or board member of the International was discharged or in any way discriminated against. If the petitioner had desired to discharge a union member, it could have discharged the president of International, Willene Shaw, for she herself testified that even following a warning from Baker respecting her work

and his having given her two weeks time in which to improve, she continued to fail to earn the "Code" (R. A. 93; B. A. 166-167).

Like Hale, Dora Sanders has not been returned to work (B. A. 263). No new employees have been hired in Hale's department (R. A. 205). Hale's machine is still unused (R. A. 91). Two new employees hired in another department were members of International Ladies' Garment Workers Union (B. A. 164; R. A. 92).

It was and is the Company's position that when Hale's department became overmanned, it undertook to lay off the two employees whom it deemed to be of less value to the business than the employees retained. The Board contends that Hale was not one of the least valuable employees. The Board, therefore, is in the position of contending that the petitioner's said basis for the selection of the two employees to be laid off was incorrectly applied with respect to Hale. We respectfully submit that even if it be held that the petitioner was in error in considering Hale one of the least valuable employees in her department, there is no evidence that the same was occasioned by or due to her union activities.

In The Associated Press v. National Labor Relations Board, 301 U. S. 103, 132, this Court said:

> "The Act permits a discharge for any reason other than union activity or agitation for collective bargaining."

In Hazel-Atlas Glass Company v. National Labor Relations Board, 127 F. (2d) 109, 114, 116, the Circuit Court of Appeals for the Fourth Circuit said:

> "The issue drawn, as we have seen, is whether these men lost their positions because of union activities or because they were deemed by the employer to be of less value to the business than the workmen selected

for retention when a decline in business necessitated a reduction of the force. The burden of proof was of course upon these complainants, and the case as to these men must fall if it appears that there was no substantial evidence of unlawful discrimination, and that the findings of the Board against the employer rest upon nothing more solid than speculation or conjecture. * * *"

* * * * * * *

"There was of course ample room for difference of opinion or mistake or favoritism or other circumstances, irrelevant to this inquiry, affecting the judgment of the foremen who made the selections." (Emphasis ours.)

In American Smelting & Refining Co. v. National Labor Relations Board, 126 F. (2d) 680, 687, the Court said:

"Behney was not high in the councils of the union and there is no claim that those who were officers or active in the union's affairs were discriminated against."

CONCLUSION.

It is respectfully submitted that this Case is one calling for the exercise by this Court of its supervisory powers by granting a writ of certiorari, and thereafter reviewing and reversing the decision below.

Respectfully submitted,

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Petitioner.